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THE ANTICASTE PRINCIPLE

Cass R. Sunstein*

It is sometimes suggested that there is a sharp opposition between "liberty" and "equality."¹ If the law forbids racial discrimination in employment, it may promote equality, but perhaps it will simultaneously interfere with liberty. If the law requires wealthy people to transfer some of their income to poor people, it may promote equality, but it may also undermine liberty. If a health care program ensures universal access to health care, it may promote equality, but it could also raise serious doubts from the standpoint of liberty. The tension between liberty and equality often appears deep, and it plays a large role in American political and legal thought.

But before accepting the alleged opposition between liberty and equality, we should observe that there are many possible understandings of liberty and equality. These understandings reveal not disputes about dictionary definitions but diverse substantive judgments that need to be identified and assessed. Different conceptions of the two values will lead to different views about their relationship. For example, the term *equality* could refer to freedom from desperate conditions, in the form of minimum welfare guarantees; to a ban on discrimination on certain specified grounds; to the idea that every citizen should have the same power over political outcomes, as in the one-person, one-vote rule; to similar starting points or basic opportunities for every citizen; to similar incomes or wealth; to similar incomes unless disparities can be justified as beneficial for all; or to much more.

The same is true for *liberty*. That capacious term could refer to the basic political rights of free speech and free elections. It could include the guarantees of a fair system of criminal justice, in which rules are laid down in advance and a defendant has a right to a fair

* Karl N. Llewellyn Professor of Jurisprudence, University of Chicago. — Ed. This essay develops some ideas contained elsewhere. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 338-46 (1993). The essay greatly benefited from comments by Akhil Amar, Martha Minow, and others at a conference on equal citizenship held at Brown University in March 1994. I am also grateful for very helpful suggestions from Richard Epstein, Jane Mansbridge, and Susan Moller Okin.

1. See the helpful discussion in AMARTYA SEN, *INEQUALITY REEXAMINED* 12-30 (1992), upon which I draw here.

trial before an independent judge. It could entail social respect for the outcomes of processes in which citizens pursue their various conceptions of the good, given market forces, existing common law rules, existing preferences, and existing distributions of wealth. The term *liberty* could refer to a system that ensures autonomy in the formation of preferences and beliefs by providing a decent education for all and by counteracting unjust background conditions. It could refer to much more.

We can readily see that some conceptions of equality are quite compatible with — indeed identical to — some conceptions of liberty. For example, libertarians, who may appear to oppose equality, insist on equality of an important kind; they want to ensure that all citizens have an equal right to pursue their own ends.² An understanding of equality lies at the heart of the libertarian creed. Freedom from desperate conditions, often treated as an egalitarian idea, is an understanding of liberty as well. Those who emphasize autonomy in the formation of preferences are speaking of both equality and liberty; they want to ensure that unjustified inequalities — inequalities based upon wealth, race, or sex, for example — do not limit the free development of individual personality.

In these circumstances, it is important to be quite careful before seeing any tension between equality and liberty. Tension exists only when we specify conceptions of these broad terms that cannot peacefully coexist. Perhaps such incompatible conceptions cannot be defended. Perhaps the best conceptions of equality are entirely compatible with the best understandings of liberty.

In this essay, I seek to defend a particular understanding of equality, one that is an understanding of liberty as well. I call this conception “the anticaste principle.”³ Put too briefly, the anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so. On this view, a special problem of inequality arises when members of a group suffer from a range of disadvantages because of a group-based characteristic that is both visible for all to see and irrelevant

2. See *id.* at 22 (arguing that libertarians “insist[] on equal immunity from interference by others”).

3. Related ideas can be found in LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21 (2d ed. 1988), and Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 147-70 (1976). There are, however, important differences between these approaches and what I defend here, partly because of my understanding of the equality principle, and partly because I suggest that the principle is for legislative rather than judicial enforcement. Many such differences will emerge in the course of the discussion.

from a moral point of view. This form of inequality is likely to be unusually persistent and to extend into multiple social spheres, indeed into the interstices of everyday life.

I do not claim that this is the only valid understanding of equality. On the contrary, there are many such understandings. Our Constitution's equality principle is plural rather than singular. It has numerous manifestations;⁴ a unitary conception of equality would not exhaust the term as it operates in American legal and political discussion. Consider political equality and principles disallowing discrimination on the basis of religious conviction or prejudice. These conceptions of equality warrant support, and they have considerable grounding in our constitutional traditions.⁵

I emphasize the anticaste principle, not because it exhausts the concept of equality, but because it captures an understanding that has strong roots in American legal traditions, has considerable independent appeal, is violated in many important parts of American life, and fits well with the best understandings of liberty. In other words, the anticaste principle is an important and perhaps insufficiently appreciated part of the lawyer's conception of equality under the American Constitution.⁶

In describing the anticaste principle, I also offer some information about racial and gender disparities in the United States. I do so because it is hard to have a sense of the world of discrimination without having a good sense of the data. Legal discussions about equality are too often and too exclusively conceptual, attempting to offer perspicuous descriptions of discrimination or inequality without a sufficient discussion of the facts that underlie either the problem or the solutions.⁷ I will not offer much detail about solutions here, but I do hope that my presentation of information about existing inequalities will help to illuminate the problem.

I emphasize as well that enforcement of the anticaste principle is mostly for legislative and executive officers and only secondarily for courts. Sometime in the late nineteenth and early twentieth centuries, there was a large-scale transformation in the substance of the constitutional equality principle. This is a long and as-yet-untold

4. In this way it is similar to most constitutional rights, which serve a number of functions.

5. Some are discussed in SUNSTEIN, *supra* note *, at 123-61.

6. Although this is a lawyer's conception, it is mostly for nonjudicial enforcement. See *infra* section II.B.2.

7. See Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, (Feb. 28, 1994) (unpublished manuscript, on file with author) (discussing the need for data and midlevel solutions in feminist reform of criminal law).

story. A set of amendments originally designed at least in part to eliminate social caste eventually became a requirement that legislation be reasonably related to legitimate state interests — a requirement whose original home was the Due Process Clause.⁸ The transformation makes some sense if we think about the limited capacities of the judiciary. Taken seriously, a full-blown anticaste principle is beyond judicial competence. But if the Constitution speaks to nonjudicial actors as well, the broad commitments of the Fourteenth Amendment have a different meaning outside the courtroom. It is possible, in short, to insist on the continuing importance of one of the great unused provisions of the Constitution, Section 5 of the Fourteenth Amendment: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”⁹

I. FALSE STARTS

In this Part, I discuss three understandings of the equality principle. All three have played a major role in public and sometimes legal debate. The first stresses the advantages of free markets. The second relies on respect for existing preferences. The third and most important sees the equality principle as a ban on unreasonable distinctions between social groups. As we will see, the difficulties with each of these understandings help lay the foundation for the anticaste principle.

A. *Markets?*

In light of the extraordinary recent outburst of international enthusiasm for free markets, it should not be surprising to find a resurgence of the view that all invidious discrimination on the basis of race and sex will be eliminated by *laissez faire*.¹⁰ On this view, the appropriate approach for law would be to eliminate constraints on market ordering and to rely solely on property rights, voluntary arrangements, and freedom of contract to produce equality.

8. U.S. CONST. amends. V, XIV; *see, e.g., Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897) (striking down a Louisiana law limiting the right of out-of-state insurance companies to do business in Louisiana as an infringement on liberty of contract not justified by the law's purpose).

9. U.S. CONST. amend. XIV, § 5.

10. *See, e.g.,* RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* 59-78 (1992). *But see id.* at 76 (conceding that discrimination of some sort will persist in markets because such discrimination is “rational”). I focus on race and gender equality, with occasional reference to disability. Other forms of inequality raise additional issues that I cannot take up here. *See infra* section II.B.4.

In many ways, free markets are indeed connected with equality on the basis of race and sex. Legal barriers to female and black employment are a form of government intervention in the market, and they have often been an effective and severe hindrance to equality. Antifemale and antiblack cartels, especially when government-sponsored, can drive down both wages and employment for women and blacks. In a free market, by contrast, all people should succeed to the extent that they are able to perform their respective functions — as employers, employees, co-workers, and customers. It is unnecessary to stress that women and blacks often perform as well as or better than men and whites. Once discriminatory laws are eliminated, free markets may therefore accomplish a great deal in breaking down a system of inequality. In South Africa, for example, it is most doubtful that the system of apartheid could have survived under free markets. Too many employers would have found it desirable to hire blacks; too many companies would have found it in their economic interest to serve people on a nondiscriminatory basis.

The point can be made through a simple example. Suppose that an employer prefers to hire only men; suppose he believes that women belong in the home. This employer should face severe obstacles to continued profitability and, in the end, might even be driven out of the market. An employer who restricts himself to one social group will be placed at a serious disadvantage; it would be as if he refuses to hire people whose last names begin with a particular letter. If the employer is sexist or racist, his “taste” for discrimination operates as an implicit tax on the operation of his business. To say the least, self-imposed implicit taxes are self-defeating in a competitive market.

Much the same can be said for a company that prefers to serve only whites or men. Such a company will artificially restrict its business to one social group, and it will thus impair its own economic interests by reducing its market and the corresponding demand for its product. An employer who hires and serves women as well as men should do much better in market competition.

As a complete solution, however, free markets will be inadequate if used to remedy sex and race discrimination. There are several reasons.¹¹ First, a market system allows discriminatorily motivated third parties to impose costs on people who agree to

11. A more detailed discussion, with citations, can be found in Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 Soc. PHIL. & POLY. 22, 23-34 (1991).

treat men and women, or blacks and whites, equally.¹² Customers, co-workers, and others sometimes withdraw patronage and services from nondiscriminatory employers. For example, a law firm that hires female lawyers might find itself punished in the marketplace. A grocery store that hires blacks might find it harder to attract customers. Under these circumstances, market pressures do not check discrimination but instead increase the likelihood that it will continue. Ironically, the failure to discriminate operates as a tax on the employer's business, rather than vice versa. A nondiscriminator could face the equivalent of a self-imposed tax by virtue of co-worker or customer reactions.

The phenomenon is hardly unusual. Consider, for example, a shopkeeper whose customers do not like dealing with blacks or women; a commercial airline whose patrons react unfavorably to female pilots; a university whose students and alumni prefer a primarily white faculty; a hospital whose patients are uncomfortable with female doctors or black nurses. The persistence of private segregation in major league baseball is a familiar example. The latter finds a modern analogue in studies of the prices of baseball cards, which show a race-based premium for white players.¹³ We may speculate that in some athletic competitions customers prefer white athletes, and these preferences play a role in some market decisions. In cases of this kind, market pressures create rather than prevent discrimination.¹⁴

Of course, third parties do not have uniform preferences. Many and perhaps most whites and men are not discriminators. In any case third-party preferences are sharply divided, and for this reason we should expect a wide range of diverse views and practices, each gaining and losing influence in different times and places.¹⁵ My point is only that in some important sectors, and for important lengths of time, the existence of third-party discrimination can en-

12. See GEORGE A. AKERLOF, *The economics of the caste and of the rat race and other woeful tales*, in AN ECONOMIST'S BOOK OF TALES 23, 31-43 (1984).

13. See Clark Nardinelli & Curtis Simon, *Customer Racial Discrimination in the Market for Memorabilia: The Case of Baseball*, 105 Q.J. ECON. 575 (1990).

14. On this account it remains necessary to explain why third parties are not themselves hurt by their taste. Sometimes they will be; an employee who prefers not to work with women may find himself with a worse job. But sometimes the third parties will not suffer competitive injuries in markets because they are not competing in markets — consider people who prefer not to fly in airplanes piloted by blacks — and sometimes the harm inflicted by a discriminatory taste will operate like any other harm inflicted by a taste, for example, the taste for color television or high-quality ice cream. Prices will go up, but the relevant goods will not be driven from the market.

15. The point is emphasized in EPSTEIN, *supra* note 10, at 30-31, 44-46.

sure that inequality persists even in free markets. The extent of the effect is of course an empirical question.

Thus far, then, we have seen that co-worker and customer discrimination may lead markets to perpetuate discrimination. A second problem with relying on markets to produce equality is that race and sex discrimination can be a successful and indeed ordinary market response to generalizations or stereotypes that, although overbroad and perhaps in one sense even invidious, provide an economically rational basis for market decisions.¹⁶ If stereotypes are economically rational, the market will not operate against them. Stereotypes and generalizations are of course a common ingredient in market decisions. There are information costs in making distinctions within categories, and people sometimes make the category do the work of a more individualized and perhaps more costly examination into the merits of the particular employee.

Many categorical judgments are not only pervasive but also legitimate. We all rely on them every day. Employers rely on proxies of various kinds, even though the proxies are overbroad generalizations and far from entirely accurate. Test scores, level of education, and prestige of college attended are all part of rational employment decisions. Despite their imprecision, such categorical judgments might well be efficient as a cost-saving device and thus persist in free markets; but they might also disserve the cause of equality on the basis of race and gender.

This is so especially in light of the fact that race and gender are so highly visible and thus so cheaply used as a proxy for other things.¹⁷ Different characteristics — for example, educational attainment — might be more accurate as proxies but less efficient to use because the cost of gaining accurate information is higher.

We might compare statistical generalizations of the sort I am describing with the category of *prejudice*. Perhaps we can understand that controversial term to include a continuum of unnecessary or inefficient categorical judgments, including, for example, (i) a belief that members of a group have certain characteristics when in fact they do not, (ii) a belief that many or most members of a group have certain characteristics when in fact only some or a few do, and (iii) a reliance on fairly accurate group-based generalizations when

16. See Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

17. The point is, of course, related to the discussion of why a morally irrelevant characteristic should be highly visible in order to be part of a caste system. See *infra* text accompanying notes 70-75.

more accurate and reasonably cheap classifying devices are available, or, in other words, when there is a more efficient classifying device. Statistical discrimination is quite different. It occurs when the generalization, though inaccurate, is less costly to use than any subclassifying device, even though subclassifications would be more accurate in particular cases. Under plausible assumptions about the cost of acquiring information, statistical discrimination might well be efficient.

Reliance on race- or sex-based generalizations may be a product of prejudice, but this need not be the case. Generalizations about race and gender may well be overbroad, but no more so than generalizations that are typically and unproblematically used in many areas of decision. Note that “college attended” might well be used in the employment market, despite its considerable imprecision as a classifying device. Moreover, in the area of sex discrimination, an employer might discriminate against women, not because he hates or devalues them, but because he has found from experience that women devote more time to child care than do men, or that women are more likely to take leave for domestic duties. For this reason sex discrimination might be based on genuine facts, not irrational prejudice — although those facts may themselves be a product of discrimination elsewhere, particularly within the family.¹⁸ This form of statistical discrimination — judgments based on statistically reasonable stereotyping — need not be a form of prejudice.

My point here is not to celebrate or to condemn statistical discrimination but instead to say that economically rational decisions can ensure that inequality will persist for women or blacks, even or perhaps especially in free markets. In various ways, blacks differ from whites and women differ from men. In light of these differences, it is fully possible that in certain settings, race- or sex-based generalizations are sufficiently accurate as proxies for certain characteristics. The conclusion is that free markets will not drive out discrimination to the extent that discrimination is an efficient use of generalizations that, while inaccurate in some ways, have sufficient accuracy to persist as classificatory devices.

This point suggests that there is no sharp discontinuity between laws calling for affirmative action and laws embodying the antidiscrimination principle, at least if the outlawed discrimination is a form of statistical discrimination. The ban on statistical discrimina-

18. See SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* 110-33 (1989) (arguing that the family as currently constituted “raises psychological as well as practical barriers against women in all other spheres”).

tion shows that the law does not just forbid irrational bigotry or prejudice. Instead, the most elementary antidiscrimination principle singles out one kind of economically rational stereotyping and condemns it, on the theory that such stereotyping has the harmful long-term consequence of perpetuating group-based inequalities. Along this dimension, the distinction between affirmative action and antidiscrimination is thin in principle.¹⁹ It is thin because the law does not only ban discrimination rooted in prejudice or hostility; it also bans discrimination in the form of statistical generalizations of the sort that employers, customers, and others rely on all the time. The ban on statistical discrimination is based on many of the reasons that support affirmative action. I do not contend that the two are the same thing.

Thus far, then, we have seen that markets are unlikely to bring about equality on the basis of race and sex when third parties are in a position to impose costs on nondiscriminators and when statistical discrimination is rational. The third problem with relying on *laissez faire* to eliminate discrimination is that in free markets, people who are subject to discrimination may fail to attempt to overcome their unequal status because they will fail to invest in "human capital" — the time and effort, in terms of education and experience, needed to produce economically valued characteristics. They may fail to do so simply because of current social practices and a discriminatory status quo. Suppose, for example, that there is current sex discrimination in a certain field for any number of reasons — employers themselves prefer to hire male employees, or third parties impose pressures in discriminatory directions, or employers engage in statistical discrimination. These discriminatory phenomena will affect the decisions of women with regard to education or training in the relevant field and indeed may affect their aspirations in general. As market participants, women might well invest less than men in training to be, for example, doctors or technicians, if these professions discriminate against women and thus reward their investments less than those of men. The decision to invest less would be fully rational as a response to the practices of employers.²⁰

19. See David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (arguing that insistence on nondiscrimination in fact amounts to affirmative action when racial classifications are accurate).

20. Notably, this is a form of market failure, unlike the first two problems. The lower investments in human capital will produce externalities. See Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 340 (1983) (producing a model in which workers with similar initial capabilities end up with different amounts of human capital according to how much employers are willing to pay different groups of workers).

Of course the same would be true in the racial context. If law firms are less likely to hire blacks than whites, blacks will, other things being equal, be less inclined than whites to go to law school. If shops are less likely to hire blacks than whites, blacks will be less likely than whites to acquire the skills necessary to work in shops. In every sector of the market that contains discrimination, the behavior of prospective black employees will be affected, in the sense that blacks will scale back their investments in acquiring the requisite training and skills.

The result of these various factors can be a vicious circle or even a spiral. Because of existing discrimination, members of the relevant groups will invest less in human capital. Because of this lower investment, the discrimination may persist or even increase, because its statistical rationality increases. Because of this effect, the discriminatory tastes of employers and customers may well increase. Because of this effect, investments in human capital will decrease still further, and so on.

These considerations suggest that although free markets can often help further the cause of race and gender equality, they are not a panacea. Discrimination can persist because of the effects of third-party discriminators, because of statistical discrimination, and because of adverse effects on investment in human capital.²¹ If discrimination is to be reduced,²² markets are not enough; supplemental legal controls will be necessary. Empirical questions are very important here, and we cannot get a full handle on the subject without knowing a great deal about the facts. For example, in some imaginable contexts, third-party prejudice will be too weak to promote much discrimination, and in some imaginable contexts, prejudice will be a spur to further investments in human capital. What I am suggesting here, based on highly plausible assumptions and supported by recognizable phenomena in the United States, is that free markets can fail to undermine race and sex inequality.

B. *Preferences?*

I turn now to an influential claim about the relationship between discrimination and law. The claim is that the legal system should take preferences as a given rather than attempt to alter

21. Of course women and blacks have sometimes invested a large amount to overcome discrimination, and of course I am describing possibilities, not certainties. To see the effects of free markets on race and sex equality, a good deal of empirical data is necessary.

22. The question whether discrimination should be reduced requires a theory of equality, which reliance on free markets does not itself provide.

them. This claim seems especially important for sex equality, though it bears on race equality as well. In many different nations, and in some places in the United States, women frequently say that they are content with the sexual status quo. Legal efforts might therefore be thought to represent an unacceptable form of paternalism. If women themselves are content, on what basis can the legal system intervene? Is not legal intervention an illegitimate interference with the right to liberty or autonomy? Thus some people suggest, for example, that abortion cannot possibly raise problems of sex equality because many women are opposed to abortion.²³

These questions raise some complex issues; I deal with them only briefly here.²⁴ The basic response is that a social or legal system that has produced preferences, and has done so by limiting opportunities unjustly, can hardly justify itself by reference to existing preferences. The satisfaction of private preferences, whatever their content and origins, does not respond to a persuasive conception of liberty, welfare, or autonomy. The notion of autonomy should refer instead to decisions reached with a full and vivid awareness of available opportunities, with relevant information, and without illegitimate or excessive constraints on the process of preference formation. When there is inadequate information or opportunity, decisions and even preferences should be described as unfree or nonautonomous.

Private preferences often do adjust to limitations in current practices and opportunities. Consider here the story of the fox and the sour grapes.²⁵ The fox does not want the grapes because he considers them to be sour, but his belief that the grapes are sour is based on the fact that they are unavailable. One cannot therefore justify the cessation of the fox's efforts to get the grapes by reference to the fox's preferences. Mary Wollstonecraft's *A Vindication of the Rights of Women*²⁶ applies this basic idea to the area of discrimination on the basis of sex. Wollstonecraft writes, "I will venture to affirm, that a girl, whose spirits have not been damped by inactivity, or innocence tainted by false shame, will always be a romp, and the doll will never excite attention unless confinement

23. See, e.g., Michael W. McConnell, *How Not To Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1190 & nn.17-18 (1991) (book review).

24. For further discussion, see ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); JON ELSTER, *SOUR GRAPES* (1983); SEN, *supra* note 1, at 53-55.

25. See ELSTER, *supra* note 24, at 109-40 (including an extended argument on the point).

26. MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMEN* (Carol H. Poston ed., Norton & Co. 1975) (2d ed. 1792).

allows her no alternative."²⁷ Mill makes the same points in his work on sex equality.²⁸

Amartya Sen offers an especially vivid real-world example from India. In 1944, the All-India Institute of Hygiene and Public Health surveyed widows and widowers about their health. About 48.5% of the widowers said that they were "ill" or in "indifferent" health, while only 2.5% of widows gave the same response.²⁹ In these circumstances it would seem odd to base health policy on subjectively held views about health conditions. Such an approach would ensure that existing discrimination would be severely aggravated.

One goal of a legal system is, in short, to ensure autonomy not merely in the satisfaction of preferences but also and more fundamentally in the processes of preference formation. The view that freedom requires an opportunity to choose among alternatives finds a natural supplement in the view that people should not face unjustifiable constraints on the free development of their preferences and beliefs.

This discussion does not at all mean that government should feel free to reject existing views of the citizenry, or that such views are irrelevant to antidiscrimination policy. For purely prudential reasons, it is important for government to be cautious about intruding on widespread current views even if it seems clear that they are wrong. A system of governmental reforms that does not connect with public convictions is likely to be futile or self-defeating. Moreover, government is itself vulnerable to the same distortions that affect private preferences.³⁰ There is no reason to think that the judgments that underlie government action are systematically less susceptible to distortion than the judgments that underlie private action. In addition, there is certainly some relation between private desires and individual and social welfare, and for this reason private desires should generally count in deciding on appropriate policy.

For all these reasons government should be modest in its willingness to revisit private desires and beliefs; certainly it should be cautious before proceeding against apparently widespread public judgments. All I suggest here is that private preferences are an un-

27. *Id.* at 43.

28. See JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 15-16 (MIT Press 1970) (1869) (writing against the claim that the existing desires of women are a product of consent).

29. AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 82 (1985); see generally JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 169-72 (1994).

30. See W. KIP VISCUSI, *FATAL TRADEOFFS* 21-23 (1992) (illustrating this point for risk perceptions).

promising foundation for antidiscrimination policy to the extent that such preferences can be shown to be a product of unjust background conditions.

C. *Irrational or Unreasonable Distinctions?*

Much of equality law has proceeded by asking whether similarly situated people have been treated differently. On this view, blacks can be treated differently from whites only when they are different from whites; the same is true of differential treatment between women and men. At least implicitly, legal doctrines in the area of discrimination allow differences in treatment when people really are different and ban differences in treatment when people really are the same.³¹

It will readily appear that the notion that the similarly situated must be treated similarly is purely formal. To become workable, that notion requires a substantive theory explaining what sorts of similarities and differences are relevant. Blacks and whites, for example, are differently situated along many dimensions; so too are women and men. The government could not justify a racially discriminatory law enforcement policy on the ground that blacks are disproportionately involved in crime, even if such a policy could be justified by reference to actual racial differences with respect to participation in crime. What is necessary is a theory to explain when differences will be treated as relevant. By itself the "similarly situated" test cannot supply that theory. From this we might conclude that the problem with the theory is that it is empty, not that it is wrong.³²

As a reaction to the "similarly situated" test in the abstract, this conclusion seems right. But from Supreme Court jurisprudence over the last few decades, we can construct a general understanding

31. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981) (upholding men-only draft registration on the grounds that "[m]en and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft"); *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (plurality opinion) (upholding a statutory rape law applying only to underage females because "the statute . . . reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than the male"); *Califano v. Webster*, 430 U.S. 313, 317-18 (1977) (upholding a statute that treated men and women differently with respect to social security benefits because Congress acted to compensate women for past employment discrimination); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (plurality opinion) (striking down a statute that treated men and women differently with respect to social security benefits in part because Congress did not enact the scheme "to remedy the arguably greater needs of women").

32. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543-48 (1982) (arguing that equality is meaningless without a separate standard for judging whether people are the same or different).

of what the test means, and this understanding is not merely formal. On that understanding, blacks must be treated the same as whites to the extent that they are the same as whites; women must be treated the same as men to the extent that they are the same as men. But these ideas also seem unhelpful. To what extent are blacks the same as whites, and to what extent are women the same as men? The law has answered this question largely by saying that blacks and whites should almost always be taken to be the same, and that women should be taken to be the same as men unless there is (i) a physical difference associated with reproduction,³³ (ii) a legally constructed difference not itself in dispute,³⁴ or (iii) a difference closely associated with past discrimination for which the law in dispute operates as a remedy or compensation.³⁵ In all other cases, distinctions based on race and gender should be struck down as irrational, as stereotypical, or as based on hostility and prejudice.³⁶ It follows that the law operates as a ban on formal inequality of the sort that prohibits most explicit distinctions between men and women or blacks and whites.

There is much to be said on behalf of invalidating formal distinctions on the basis of race and gender. Wholesale disparagement of the pursuit of formal equality makes little sense. In the racial context, formal inequality is often associated with second-class citizenship for blacks. Sometimes the same has been true for gender as well, as in the exclusion of women from the jury and from the practice of law. Many formal distinctions do help produce inequality in the form of second-class status, and many of them are based on prejudice. Even if some formal distinctions between blacks and whites or men and women can be justified, a strong presumption against such distinctions might be defended as being well adapted to the limited capacities of courts. Individualized inquiry into the legitimacy of formal distinctions might produce too many errors in particular cases. Perhaps a flat ban on race and sex distinctions could be justified as a way of producing results that make sense in the aggregate and that allow errors that are few enough in number to be acceptable in light of the risks that would be produced by more individualized inquiry. In addition, formal inequalities tend

33. *Michael M.*, 450 U.S. at 471-73.

34. *Rostker*, 453 U.S. at 78.

35. *Webster*, 430 U.S. at 318.

36. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (striking down a statute that permitted women but not men between the ages of 18 and 20 to purchase 3.2% beer); see also cases cited *supra* note 31.

to encourage people to think in terms of race and gender, and a broad prohibition on laws containing such inequalities therefore has a desirable educative or expressive effect.

Similar ideas could help justify a judicial refusal to test carefully laws that discriminate in fact but that do not embody formal inequality.³⁷ Careful scrutiny of laws that discriminate in fact but not on their face might lead courts to face issues that are beyond their competence and best assessed legislatively. Consider the extraordinary difficulties that would be raised by asking whether a veteran's preference law would be adopted in a world of sex equality, or whether it could be adequately justified in light of its discriminatory effects.³⁸

These considerations might form the basis for a justification of the Supreme Court's current equality jurisprudence, casting it as reasonable in principle and sensibly adapted to the courts' modest role. But there is a problem with this project. It is not at all simple to come up with a sensible theory of equality that would map onto, or adequately account for, the existing approach. On what possible theory would the Constitution ban all explicit race and sex distinctions and allow all other laws to stand? There are two problems here.

First, some deviations from formal equality might well promote equality as that term is often or best understood. Consider, for example, a decision of a local police department to furnish special police protection for women who are traveling alone at night, and suppose that the decision was based on a recent outbreak of sexual violence in the area. It is at least unclear that this decision is inconsistent with equality as it is best understood. Perhaps it promotes equality by counteracting social conditions that subject women to disproportionate risks.³⁹ From this example it may follow that some laws that treat women differently from men are acceptable and indeed promote the goal of equality, rightly understood. *Califano v. Webster*,⁴⁰ upholding formal sex discrimination in the benefit formula under social security law, is an explicit and unusual reflection of this point. Perhaps a maternal deference rule could be

37. See *Washington v. Davis*, 426 U.S. 229, 246-48 (1976).

38. See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 1000-03 (1989).

39. Cf. *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality opinion) (upholding a sex discriminatory statutory rape law on the ground that nature already deters women from engaging in sexual intercourse by imposing the penalty of pregnancy, something to which men are not subject).

40. 430 U.S. 313 (1977).

justified during child custody proceedings; perhaps alimony determinations should be required to consider domestic work, which is closely correlated with gender.⁴¹

Alternatively, some laws raise equality concerns even if they do not violate formal equality. Consider a law that forbids pregnant women from appearing in public. Perhaps no man can be similarly situated to a pregnant woman, and perhaps there is no problem, from the standpoint of formal equality, in these circumstances. But from the standpoint of sex equality, does this make any sense? Surely problems of inequality are raised by a law that penalizes a physical capacity limited to one gender.⁴² Or suppose that the law forbids women from having an abortion, or excludes pregnancy from a disability program. Under current constitutional law, there is apparently no issue of sex discrimination.⁴³ Men cannot get pregnant; women and men are to that extent not similarly situated. A law that restricts abortion or excludes pregnancy therefore raises no equality problem. But this is an odd way to think about equality. If the law takes a characteristic limited to one group of citizens and turns that characteristic into a source of social disadvantage, it may well violate the equality principle, best conceived.⁴⁴

Let us push this argument further. Sometimes equality requires the similarly situated to be treated similarly. But sometimes people who are differently situated ought to be treated differently, precisely in the interest of equality.⁴⁵ In the area of disabilities, for example, the use of stairs denies equality to people who are bound to wheelchairs, and the use of oral communication creates a problem for people who cannot hear. Legislative changes have often been based on an understanding that people who are different must

41. The point is made nicely in Mary E. Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 203-23 (1993), and Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 219-22.

42. But cf. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 760-62 (1993) (holding that "the disfavoring of abortion . . . is not *ipso facto* sex discrimination"); *Geduldig v. Aiello*, 417 U.S. 484, 494-96 & n.20 (1974) (holding that excluding pregnancy coverage from a state disability program does not violate the Equal Protection Clause absent an intent to discriminate, even though "it is true that only women can become pregnant").

43. See *Bray*, 113 S. Ct. at 760-62; *Geduldig*, 417 U.S. at 494-98 & n.20. But note too the striking appearance of arguments involving sex discrimination in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807, 2809, 2830-31 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.); 112 S. Ct. at 2842 (Stevens, J., concurring in part and dissenting in part); 112 S. Ct. at 2846-47 (Blackmun, J., concurring in part and dissenting in part).

44. See the discussion of differences in CATHERINE MACKINNON, *Difference and Domination: On Sex Discrimination*, in FEMINISM UNMODIFIED 32 (1987).

45. See SEN, *supra* note 1, at 16-19 (arguing that achieving equality in one area may necessitate inequality in another area).

be treated differently if they are to be treated equally.⁴⁶ Of course, the expense of the adaptation is relevant to the question of what, exactly, ought to be done. But constitutional doctrine has rarely recognized that differences in people's situations might justify a claim for differential treatment in the interest of equality.

We can connect this issue to the broader failure of American law to do as much as it might have about existing inequalities on the basis of both sex and race. In many areas there has been much progress; women cannot be excluded from professions, and most laws that build on or ratify sex-based stereotypes are forbidden.⁴⁷ But if we look at the basic indicators of social welfare, it is not clear how much difference the law has made.⁴⁸ The relative labor-market status of women has not changed much in the aftermath of judicial decisions.⁴⁹ The difference between the earnings of women and of men was greater in 1980 than it was in 1955, even though the key Supreme Court decisions were in the 1970s.⁵⁰ Women continue to face occupational segregation in the workforce, and the result is that women disproportionately occupy low-paying positions traditionally identified as female.⁵¹ Thus Gerald Rosenberg's influential study concludes that "[c]ourt action contributed little to eliminating discrimination against women. Cases were argued and won but, litigants aside, little was accomplished."⁵²

This conclusion is probably too blunt. It is hard to measure the real-world effects of Supreme Court decisions, and the ban on unequal treatment by government may well have made an important difference for many women, even if it is hard for social scientists to tie real-world changes to judicial decisions. A degree of agnosticism makes good sense here. But it is highly revealing that the requirement of formal equality cannot be easily associated with large-scale changes in the social welfare of women.

46. The most important example is the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (codified as amended at 42 U.S.C. §§ 12101-12213) (Supp. IV 1992).

47. See cases cited *supra* note 31.

48. See *infra* text accompanying notes 122-27; see also GERALD N. ROSENBERG, *THE HOLLOW HOPE* 207-12 (1991) (concluding that "[l]itigation has failed to end [sex] discrimination"); Mary E. Becker, *Politics, Differences, and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 172-74 (arguing that while antidiscrimination laws have produced progress for women, they have not made women economically equal to men).

49. ROSENBERG, *supra* note 48, at 207.

50. *Id.* at 207, 209 tbl. 7.1.

51. *Id.* at 209-10.

52. *Id.* at 212.

Ironically, some existing inequalities may be partly a product of contemporary equality law. After divorce, women's economic welfare goes sharply down, whereas men's goes sharply up.⁵³ Legal rules, not nature, assure this result by generally refusing to take account of domestic contributions and by refusing to regard the husband's success in the employment market as a joint asset. The relevant rules might well be subject to legal attack.

Certainly some existing inequalities stem from laws that do not violate formal equality. Consider veterans' preference laws, sex-based in effect if not in intent. Such laws are immune from attack under the formal equality standard, but they can have enormous effects on state employment.⁵⁴ Perhaps more important is the existence of a social security system that was designed for and that benefits male breadwinners, while helping women much less because women do not follow conventional male career paths.⁵⁵ The failure to provide adequate protection against rape, sexual harassment, and other forms of sexual assault and abuse might also raise equality issues; these failures raise no problems under the formal equality approach.

Now we are in a position to make some general observations about the question of race and sex differences. The question for decision is not whether there is a difference — often there certainly is — but whether the legal and social treatment of that difference can be adequately justified. Differences need not imply inequality, and only some differences have that implication. When differences do have that implication, the implication is a result of legal and social practices, not the result of differences alone. Because they are legal and social, these practices might be altered even if the differences remain.⁵⁶ Existing law recognizes this point insofar as formal discrimination on the basis of race and sex is prohibited even if based on differences that are "real" in the sense that as a matter of simple fact, blacks are not similarly situated to whites and women

53. See OKIN, *supra* note 18, at 160-67, 337; LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 337-40 (1985).

54. See *Personnel Admr. v. Feeney*, 442 U.S. 256, 259 (1979) (holding that a Massachusetts law giving absolute lifetime preferences to veterans for civil service positions does not violate the Equal Protection Clause even though the law "operates overwhelmingly to the advantage of males").

55. See Becker, *supra* note 48, at 176-78 (citing statistics to show the adverse consequences of structural discrimination in the social security system).

56. See MACKINNON, *supra* note 44, at 32-45 (arguing for an equality principle focusing on gender dominance, not gender difference); see also JOHN RAWLS, *A THEORY OF JUSTICE* 107-08 (1971) (stressing how the social structure affects the naturally unequal distribution of talents and privileges).

are not similarly situated to men.⁵⁷ But existing law stops short insofar as it does not allow attacks on discriminatory but facially neutral practices based on an unequal status quo.⁵⁸

An analogy may be helpful here. The problems faced by disabled people are not a function of disability "alone" (an almost impenetrable idea — what would current disabilities even mean in a different world?) but are instead the result of the interaction between physical and mental capacities on the one hand and a set of human obstacles made by and for the able-bodied on the other. It is those human obstacles, rather than the capacities taken as brute facts, that create a large part of what it means to be disabled. One could not defend, for example, the construction of a building with stairs and without means of access for those on wheelchairs on the ground that those who need wheelchairs are different. The question is whether it is acceptable, or just, to construct a building that excludes people who need an unusual means of entry. That question may not be a simple one, but it cannot be answered simply by pointing to a difference.

We might conclude that there are two fundamental problems with the "similarly situated" idea. The first is that the idea cannot be made operational without a theory of some kind. The second is that the implicit theory behind the current approach seems hard to justify or even to describe. The best defense would suggest that the approach is adapted to a reasonable understanding of equality, or several reasonable understandings, while at the same time being uniquely well suited to judicial administration. This defense is far from implausible, but it suggests that a full justification of the constitutional equality principle remains to be offered.

II. THE ANTICASTE PRINCIPLE

A. Definition

I suggest that in American constitutional law, an important equality principle stems from opposition to caste. This principle grows out of the original rejection of the monarchical legacy⁵⁹ and

57. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977) (plurality opinion) (forbidding discrimination in social security even though men are less frequently dependent on their spouses than are women); see also *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427 n.11 (1994) (stating that peremptory challenges are forbidden even if women's perceptions really are different from men's); 114 S. Ct. at 1432 (O'Connor, J., concurring) (emphasizing that law does not always take real differences into account).

58. See, e.g., *Feeney*, 442 U.S. at 260.

59. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 95-109 (1992) (discussing consequences of the attack on monarchical heritage).

the explicit constitutional ban on titles of nobility.⁶⁰ The principle was fueled by the Civil War Amendments and the New Deal. The opposition should be understood as an effort to eliminate, in places large and small, the caste system rooted in race and gender. A law is therefore objectionable on grounds of equality if it contributes to such a caste system. The controlling principle is that no group may be made into second-class citizens. Instead of asking "Are blacks or women similarly situated to whites or men, and if so have they been treated differently?" we should ask "Does the law or practice in question contribute to the maintenance of second-class citizenship, or lower-caste status, for blacks or women?"

I do not suggest that the caste features of current American practices are at all the same, in nature or extent, as those features of genuine caste societies. I do not suggest that dictionary definitions of *caste*, or caste systems as understood in, say, India, lead to the simple conclusion that there are major caste characteristics to modern American society. Certainly it is true that blacks and women have risen to most of the highest reaches of American society; certainly it is true that the most conspicuous legal barriers have fallen; and these phenomena, along with many others, suggest that we do not have anything like a genuine caste system. But the similarities between true caste systems and existing American inequalities are what make our current practices a reason for collective concern.

The motivating idea behind an anticaste principle is that *without good reason, social and legal structures should not turn differences that are both highly visible and irrelevant from the moral point of view into systematic social disadvantages*. A systematic disadvantage is one that operates along standard and predictable lines in multiple and important spheres of life and that applies in realms that relate to basic participation as a citizen in a democracy. There is no algorithm by which to identify those realms. As a provisional working list, we might include education, freedom from private and public violence, income and wealth, political representation, longevity, health, and political influence. The anticaste principle suggests that with respect to basic human capabilities and functionings,⁶¹ one group, defined in terms of a morally irrelevant characteristic, ought not to be systematically below another. As we will soon see, the Civil War Amendments can be understood as an effort to counteract this form of disadvantage.⁶²

60. U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. art. I, § 10, cl. 1.

61. See SEN, *supra* note 1, at 39-42 (discussing capabilities and functionings).

62. See *infra* text accompanying notes 81-89.

In the areas of race and sex discrimination, a large part of the problem is this sort of systemic disadvantage. A social or biological difference has the effect of systematically subordinating members of the relevant group — not because of nature, but because of social and legal practices. This phenomenon occurs in multiple spheres and along multiple indices of social welfare: poverty, education, political power, employment, susceptibility to violence and crime, distribution of labor within the family, and so forth. My emphasis on these variables should make clear that I am not stressing economic factors alone, though these are indeed important. I am instead suggesting reference to a broad and eclectic set of social indicators.

Consider in this regard the Human Development Index in the United Nations' 1993 *Human Development Report*.⁶³ The index, based on longevity, educational attainment, and per capita income, is itself extremely crude.⁶⁴ But it is highly revealing that the United States as a whole ranks sixth; that white Americans by themselves would rank first; and that black Americans by themselves would rank thirty-first, next to Trinidad and Tobago.⁶⁵ Consider as well the fact that every nation in the survey provides better lives for men than for women.⁶⁶

Systematic differences of this kind help produce frequent injuries to self-respect — the time-honored constitutional notion of "stigma." A particular concern is that self-respect and its social bases ought not to be distributed along the lines of race and gender.⁶⁷ When someone is a member of a group that is systematically subordinate to others, and when the group characteristic is highly visible, insults to self-respect are likely to occur nearly every day. An important aspect of a system of caste is that social practices produce a range of obstacles to the development of self-respect, largely because of the presence of the highly visible but morally irrelevant characteristic that gives rise to lower-caste status. Of course the law cannot provide self-respect, at least not in any simple or direct way. But group membership tends to fuel the cycle of discrimination dis-

63. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1993 (1993) [hereinafter HUMAN DEVELOPMENT REPORT].

64. See Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456, 2463-68 (1994) (this issue); Cass R. Sunstein, *Well-Being and the State*, 107 HARV. L. REV. 1303, 1322 (1994).

65. HUMAN DEVELOPMENT REPORT, *supra* note 63, at 18 & figs. 1.12-13.

66. *Id.* at 18 & tbl. 1.3.

67. Self-respect is emphasized in RAWLS, *supra* note 56, at 440-46, and JOHN RAWLS, *POLITICAL LIBERALISM* 82, 106, 180-81 (1993).

cussed in Part I, in which employers rely on statistical discrimination, group members adjust their aspirations to this reliance, statistical discrimination becomes all the more rational, and so on.⁶⁸ That is the caste system to which the legal system must respond. The system can operate largely because of the high visibility of the group characteristic.

Ideas of this kind raise some obvious questions: Should we not speak of individuals instead of groups? Is it not equally bad to have, say, ten percent of the population in desperate or unfortunate conditions, as compared with having a high percentage of black Americans in such conditions? And exactly why must the morally irrelevant characteristic be highly visible? It is true that an old and independent liberal principle protects freedom from desperate conditions,⁶⁹ and that principle is offended whenever people do not have basic subsistence. Freedom from desperate conditions is a liberal principle connected with both equality and liberty, and it can be violated even in the absence of group-based disadvantages. What I am suggesting is that a separate problem of inequality, one with constitutional dimensions, arises when a group of people, defined in terms of a characteristic that is both highly visible and morally irrelevant, faces second-class status. The anticaste principle may be offended by second-class status even if most or all of the caste's members are living at or above a decent floor. A special problem with use of a highly visible but morally irrelevant characteristic is that each group member — every black American and

68. See *supra* text accompanying notes 20-21.

69. Thus Thomas Jefferson wrote:

I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind. . . . Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise. Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate the natural right. The earth is given as a common stock for man to labour and live on.

Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 681, 682 (Julian P. Boyd et al. eds., 1953).

Similarly, James Madison wrote:

The great object should be to combat the evil: 1. By establishing a political equality among all. 2. By withholding *unnecessary* opportunities from a few, to increase the inequality of property, by an immoderate and especially an unmerited, accumulation of riches. 3. By the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.

James Madison, *Parties*, NATL. GAZETTE, Jan. 23, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 197, 197 (Robert A. Rutland et al. eds., 1983).

every woman — may well be subject, some of the time, to a distinctive stigma by virtue of group membership. That stigma is part of what it means to be a member of a lower caste.

Because the stigmatizing characteristic is highly visible, it will probably trigger reactions from others in a wide variety of spheres, even in the interstices of everyday life.⁷⁰ Highly visible characteristics are especially likely to be a basis for statistical discrimination and to fuel prejudice from third parties. For some purposes, however, it might make sense to speak as well of characteristics that, while not highly visible, are easily verified. And often characteristics become visible, or are thought to be visible, precisely because they are a basis for social disadvantage. Consider stereotypes about the physical characteristics of members of religious minorities, and compare this description of attitudes in prerevolutionary America:

So distinctive and so separated was the aristocracy from ordinary folk that many still thought the two groups represented two orders of being. . . . Ordinary people were thought to be different physically, and because of varying diets and living conditions, no doubt in many cases they were different. People often assumed that a handsome child, though apparently a commoner, had to be some gentleman's bastard offspring.⁷¹

In the area of race and gender, daily denials of basic respect, usually based on prejudice of some sort, are a large part of what it means to have a caste system. With blacks, for example, dark skin color is associated with a range of stereotypes that can have harmful effects during encounters with shopkeepers, employers, police officers, businesses, co-workers, and much more. With women, the problem is not so much hostility as a range of expectations about social role that are closely associated with inequality or condescension, often in the nominally personal and even familial sphere.⁷² It is for this reason that the argument I am making works best when the morally irrelevant characteristic is highly visible.⁷³ When the characteristic is not highly visible, we cannot have a caste system as I understand it here, though the translation into disadvantage of a

70. See Jane Mansbridge, *Equal Citizenship in Everyday Life*, Presentation to the Conference on Equal Protection and its Critics at Brown University (Mar. 11-12, 1994) (unpublished manuscript, on file with author) (discussing daily effects of inequality).

71. WOOD, *supra* note 59, at 27.

72. See OKIN, *supra* note 18, at 134-69.

73. Compare Justice Marshall's reference to a black railroad porter who reported that "he had been in every city in this country . . . and he had never been in any city in the United States where he had to put his hand up in front of his face to find out he was a Negro." Henry J. Reske, *Marshall Retires for Health Reasons: First Black Justice Fought Discrimination As Litigator, Supreme Court Dissenter*, A.B.A. J., Aug. 1991, at 14, 15 (quoting Justice Thurgood Marshall).

morally irrelevant but invisible characteristic⁷⁴ can raise important equality concerns as well.⁷⁵

Under the principle I am describing, a history of discrimination is not a necessary condition for status as a lower caste, though in practice such a history is highly probable. No group is likely to become second class in the sense used here unless it has been subject to past discrimination. The discrimination may take the form of legal and social practices that are not discriminatory on their face but that translate certain characteristics into a systemic basis for disadvantage.⁷⁶ If social and legal practices have that consequence, we have a system with castelike features and a legal response is appropriate — even though the absence of intentional discrimination may make the call for response less insistent.

B. *Markets, History, Institutions*

1. *Markets and Moral Irrelevance*

The anticaste principle leaves many ambiguities. What is the set of morally irrelevant differences? What does it mean to say that such differences may be turned into disadvantages if the state has good reasons for doing so? And who will be doing the remedial work?

The initial point is that whether it is permissible to invoke a morally irrelevant difference is determined by the context.⁷⁷ As a general rule skin color should be taken to be morally irrelevant, but for some people it may be made relevant to private life, as in the selection of intimate friends; gender may play a large role in many

74. This may well be true of homosexuality. Under my definition, homosexuals do not constitute a lower caste, though discrimination against them may be illegitimate and though the caste system based on gender may lie behind discrimination based on sexual orientation. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. (forthcoming May 1994) (arguing that discrimination based on sexual orientation is a form of sex discrimination).

75. I return to the issue of moral irrelevance below. See *infra* notes 92-94 and accompanying text.

76. Of course there is no state-of-nature argument here. Any second-class status is a product of law, even if some inequalities would arise in the state of nature, a possibility with no moral weight. See John Stuart Mill, *Nature*, in 10 COLLECTED WORKS OF JOHN STUART MILL 373, 381-401 (J.M. Robson ed., 1969).

77. I am bracketing for the moment questions of justice within spheres that are not normally described as political. See OKIN, *supra* note 18. Susan Okin persuasively shows that injustice occurs within families and that this source of injustice is associated with many injustices elsewhere. Susan M. Okin, *Political Liberalism, Justice, and Gender*, 105 ETHICS (forthcoming Oct. 1994). The anticaste principle picks up on this idea. See *supra* text accompanying notes 63-66, 70-72. For some, gender may be morally relevant to some personal things, as in choice of partner, without being morally relevant to all personal things, as in allocation of labor within the household.

private choices, as in the selection of dancing partners. When I speak of the impermissibility of turning morally irrelevant factors into a systematic source of social disadvantage, I do not mean to deny that in many settings morally irrelevant factors may well be used. But even this point leaves numerous open questions. We do not have anything like a full account of what sorts of differences are relevant to legitimate official judgments. Can such an account be provided here?

For lawyers, at least, many of the political and moral complexities can be bracketed. Perhaps those involved in the legal system can build on the general understanding that race and gender are irrelevant from the moral point of view without making complex and perhaps sectarian claims about moral relevance in general. Indeed, one happy feature of legal thinking is that participants in legal disputes can often bracket large-scale claims about the right and the good and build *incompletely theorized agreements about particular issues*.⁷⁸ There is general public or judicial agreement that race and sex are morally irrelevant in the sense that the distribution of social benefits and burdens ought not to depend on skin color or gender. This agreement is founded on good reasons, because both of these are accidents of birth, because accidents of birth should not produce second-class citizenship, and because it is hard to imagine an account that would justify lesser benefits or greater burdens by reference to these particular accidents.⁷⁹ To say this is not to say that social roles must have nothing to do with gender; many people think that roles and gender cannot be entirely separated. But it is to say that social disadvantage cannot be justified by reference to race or sex alone, and that point is sufficient for my purposes here.

Nor, for lawyers, is the notion of moral irrelevance a new one. The anticaste principle has distinctive historical roots. Recall that the Constitution forbids titles of nobility and that an important part of the founding creed involved the rejection of the monarchical heritage, largely on the ground that monarchy made caste distinctions

78. This idea is discussed in Cass R. Sunstein, *Rules and Analogies*, 17 THE TANNER LECTURES ON HUMAN VALUES (forthcoming 1995); it has an obvious resemblance to the idea of "overlapping consensus" as found in RAWLS, *POLITICAL LIBERALISM*, *supra* note 67, at 133-72.

79. Compare on this score such accidents of birth as great strength or intelligence or ability to produce products that the market rewards. These accidents may be entangled with nonaccidental factors; promoting them brings about desirable incentives and also is associated with a range of valuable social goals, like increased productivity. Of course it would be possible to say that when people do not like people of certain races, there is a productivity loss from forbidding them to indulge their "taste" — sometimes this may even be true — but this productivity loss seems inadequate to overcome the basic case offered in the text.

among fundamentally equal human beings.⁸⁰ The Civil War Amendments were rooted in a judgment about the moral irrelevance of race, formerly taken to be relevant because of nature. In the aftermath of the American Civil War a high U.S. official stated, "God himself has set His seal of distinctive difference between the two races, and no human legislation can overrule the Divine decree."⁸¹ In the same period, antidiscrimination law was challenged squarely on the ground that it put the two races in "*unnatural relation*" to each other.⁸²

The Civil War Amendments were based on a wholesale rejection of the supposed naturalness of racial hierarchy. The hierarchy was thought to be a function not of natural difference but of law, most notably the law of slavery and the various measures that grew up in the aftermath of abolition. An important purpose of the Civil War Amendments was the attack on racial caste.⁸³ Thus Senator Howard explained that the purpose of the Fourteenth Amendment was to "abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."⁸⁴ The defining case of the Black Codes, placing special disabilities on the freedmen's legal capacities, exemplified the concern with caste legislation.⁸⁵ Thus Justice Harlan, dissenting in *Plessy v. Ferguson*,⁸⁶ wrote one of the greatest sentences in American law: "There is no caste here."⁸⁷ Contemporary understandings of sex inequality build on this basic idea.⁸⁸

I do not contend that the anticaste principle, as I describe it here, can be understood as a mechanical reflection of pre- and post-Civil War aspirations. The ratifiers did believe that caste or class legislation was forbidden; but they did not fully unpack the category. They understood that legislation always made distinctions

80. See WOOD, *supra* note 59, at 254-61 (arguing that although the Federalists and the anti-Federalists disagreed as to how privileged the government leaders needed to be, both opposed monarchical hierarchy based on heredity alone).

81. 2 CONG. REC. app. at 3 (1874) (speech of Rep. Southard).

82. 3 CONG. REC. 983 (1875) (statement of Rep. Eldredge).

83. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (arguing that the framers of the Fourteenth Amendment intended to forbid discrimination against blacks at the state level).

84. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

85. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1413 (1992) (explaining how Black Codes were used to prevent blacks from enjoying a wide variety of social and legal privileges available to whites, including testifying in court and owning property).

86. 163 U.S. 537 (1896).

87. 163 U.S. at 559.

88. See Okin, *supra* note 77.

among persons, and they thought the category of caste or class legislation was a small subset of legislation, involving illegitimate grounds for differential treatment. In seeing what counted as illegitimate grounds, they looked not to theory but to slavery and the Black Codes as defining illustrations. So far there is considerable overlap between an important strand in the Civil War period and what I am urging here. But the Civil War Amendments were targeted at caste *legislation*, that is, at specific laws that embodied discrimination and in this way helped to create caste. This is what Justice Harlan had in mind in *Plessy*. There was no general understanding that these amendments imposed on government a general duty to remove caste status or banned nondiscriminatory laws that contributed to caste status — even if it was understood that Congress would have the power to counteract the legacy of slavery with affirmative legislation.⁸⁹

The anticaste principle as I understand it here is more ambitious. It is not directed merely at caste legislation but more generally at a social status quo that, through historical and current practices, creates second-class status. We can understand this principle as emphasizing legislative rather than judicial duties and as reading the Civil War Amendments through the lens of the New Deal, which reflected an understanding that social practices are often a creation of law, at least in part, and that government is legitimately made responsible for practices that produce social evils, including pervasive deprivation.⁹⁰ Reading the Civil War Amendments through the lens of the New Deal,⁹¹ we might see a constitutional problem not only with particular caste legislation but with lower-caste status in general.

Thus far I have emphasized social consensus and history. Perhaps lawyers can build on these sources, but an adequate account of the subject of caste and moral irrelevance could not rest content with social agreement and with the past. I cannot offer that account here, but a few observations may be helpful. If the notion of moral

89. See generally Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 796-97 (1985).

90. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 100-04 (1991) (seeing both the *Lochner* Court and the New Deal as attempts to synthesize a coherent framework of rights out of existing sources of legal doctrine, including the Civil War Amendments); SUNSTEIN, *supra* note *, at 40-67 (arguing that New Deal jurisprudence recognized that social practices determining ownership rights, labor rights, and civil rights were themselves products of the legal regime).

91. See the discussion of "synthesis" in ACKERMAN, *supra* note 90, at 140-50 (arguing that *Brown v. Board of Education*, 347 U.S. 483 (1954), reinterpreted Fourteenth Amendment equal protection requirements in light of post-*Plessy* social developments).

irrelevance involves a lack of connection to either entitlement or desert, we might think that a wide range of differences among people are indeed morally arbitrary, in the sense that such differences do not by themselves justify more resources or greater welfare. In a market economy, those morally irrelevant differences are quite frequently translated into social disadvantages. Consider educational background, intelligence, physical strength, and existing supply and demand curves for various products and services. Certainly someone does not deserve more goods and services merely by virtue of the fact that many people want what he is able to provide. Consider an especially fast run from one side of a tennis court to another, or a book about a murder that is especially entertaining to read. For good instrumental reasons, including the production of desired commodities, we may well want to reward people who can provide widely valued goods; but the relationship between that talent and desert or entitlement is obscure.

In a market economy, many factors — strength, intelligence, and educational background — affect resources and welfare, and most of these factors are arbitrary from the moral point of view. Is someone really entitled to more money because he was born into a family that stressed education, or because of his intelligence, or because he happened to produce a commodity that many people like? Markets do reward qualities that are irrelevant from a moral point of view. But it would be difficult indeed to justify a principle that would attempt, through law, to counteract all or most of the factors that markets make relevant. The reason is that in general, the recognition of such factors is inseparable from the operation of a market economy, and by and large, a market economy is a source of many important human goods, including individual freedom, economic growth and prosperity, and respect for different conceptions of the good. Any legal solutions that call for major intrusions on markets must be evaluated in light of the effects on various possible human goods that those alleged solutions will compromise. If legal remedies produce more unemployment, greater poverty, and higher prices for food and other basic necessities, they are, to that extent, a bad idea.

The implementation and reach of any anticaste principle should depend on considerations of this kind. The point is not that human equality should be “traded off” against the seemingly sterile and abstract notion of market efficiency. I do not claim that otherwise unjustified inequality can be supported by some intrinsic good called “efficiency.” Efficiency is an instrumental good, though no

less important for that. I argue only that intrusions on markets may defeat valuable human goals and that this is important to keep in mind.

To be more precise: The use of the factors that ordinarily underlie markets is at least sometimes, though of course not always, in the interest of the most disadvantaged, certainly in the sense that lower prices and higher employment are especially valuable to the poor. When this is so, any government initiative that would bar use of those factors — intelligence, production of socially valued goods, and so forth — seems perverse.⁹² Moreover, a principle that would override all morally irrelevant factors would impose extraordinary costs on society, both in its implementation and administrative expense and in its infliction of losses on a wide range of people. The anticaste principle seems to have greatest appeal in discrete contexts in which gains from current practice to the least well-off are hard to imagine; in which second-class citizenship is systemic and occurs in multiple spheres and along easily identifiable and sharply defined lines; in which the morally irrelevant characteristic is highly visible; in which there will be no major threat to a market economy; and in which the costs of implementation are most unlikely to be terribly high.

Ideas of this sort do not justify a judgment that poor people constitute a lower caste. For one thing, poor people represent a broad, amorphous, not easily identified, and to some degree shifting group. When people are poor, we cannot say that social and legal practices turn a highly visible and morally irrelevant characteristic into a systemic source of social disadvantage. Of course human deprivation creates a significant problem of justice, and a recognizable constitutional understanding tries to provide all people with freedom from desperate conditions.⁹³ I mean here to identify a separate understanding — one that supports a legal assault on the castelike features of the status quo with respect to race, sex, and disability. It is relevant here that the benefits of antidiscrimination

92. Rawls's difference principle, *see* RAWLS, *supra* note 56, at 60, would almost certainly fail to justify many of the inequalities that markets introduce, since many of those inequalities do not benefit the least well-off. But a less rigid set of understandings, allowing inequalities that benefit most people, including many of the disadvantaged, would justify reliance on markets, especially in light of the government's ability to use greater aggregate wealth to help disadvantaged people and to provide a basic floor. *See* the intriguing finding in NORMAN FROHLICH & JOE A. OPPENHEIMER, *CHOOSING JUSTICE* 58-60 (1992), suggesting that in experimental studies most people choose average utility with a welfare floor, rather than the difference principle.

93. *See supra* note 69.

law do seem substantial, and the negative effects on the economy appear minor.⁹⁴

2. Judges and Legislators

Originally the Fourteenth Amendment to the Constitution was understood as an effort to eliminate racial caste — emphatically not as a ban on distinctions on the basis of race.⁹⁵ A prohibition on racial caste is of course different from a prohibition on racial distinctions. A ban on racial distinctions would excise all use of race in decisionmaking. By contrast, a ban on caste might well draw some measures having discriminatory effects into question, and it would certainly allow affirmative action programs.⁹⁶

Originally, Congress, not the courts, was to be the principal institution for implementing the Fourteenth Amendment. The basic idea was that Congress would transform the status of the newly freed slaves by engaging in a wide range of remedial measures.⁹⁷ It was not at all anticipated that federal judges — responsible for the then-recent and highly visible *Dred Scott v. Sanford*⁹⁸ decision, which established slavery as a constitutional right — would be enforcing the Amendment. Indeed, the notion that judges would play a major role in helping to bring about equality under law was entirely foreign to the drafters and ratifiers of the Civil War Amendments.

At some stage in the twentieth century, there was a dramatic change in the legal culture's understanding of the notion of equality under the Constitution. The anticaste principle was transformed

94. See John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2600-01 (1994) (this issue) (describing antidiscrimination laws as correcting market imperfections to some extent); James J. Heckman & Brook S. Payner, *Determining the Impact of Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989) (concluding that federal antidiscrimination law may account for increased wages and employment among blacks in the South Carolina textile manufacturing industry).

95. This idea is supported by Justice Harlan's statement "There is no caste here," which appears in his dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), in the sentence immediately preceding his famous assertion that "[o]ur Constitution is color-blind." 163 U.S. at 559. See the excellent discussion in T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961 (maintaining that Justice Harlan's dissent in *Plessy* can be read to support race-conscious programs that combat subordination).

96. See Schnapper, *supra* note 89, at 789-98 (arguing that history does not support the attack on affirmative action).

97. See *id.* at 784-88 (arguing that Congress intended the Fourteenth Amendment to provide a constitutional basis for An Act To Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (1865) [hereinafter *Freedmen's Bureau Act*]).

98. 60 U.S. 393 (1857).

into an antidifferentiation principle.⁹⁹ No longer was the issue the elimination of second-class citizenship. The focus shifted instead to the entirely different question whether people who were similarly situated had been treated similarly — a fundamental change. This shift in focus remains one of the great untold stories of American constitutional history.

So long as the courts were to be the institution entrusted with enforcing the Equal Protection Clause, the shift was fully intelligible, notwithstanding its problematic relationship with the original understanding of the Fourteenth Amendment and with the best understanding of what race and sex inequality really are. The judiciary simply lacks the necessary tools to implement the anticast principle. The transformation in the conception of equality is therefore understandable in light of what came to be, under the Fourteenth Amendment, the astonishing institutional importance of courts and the equally astonishing institutional insignificance of Congress. But the transformation of an anticast principle into a prohibition on racial differentiation has inadequately served the constitutional commitment to equal protection of the laws.¹⁰⁰ It has meant that too little will be done about the second-class citizenship of blacks, women, and the disabled.

If the legal culture is to return to the roots of the constitutional commitment and to a better understanding of equality, the legislative branch should take the lead. The anticast principle, if taken seriously, calls for significant restructuring of social practices. For this reason legislative and administrative bodies, with their superior democratic pedigree and fact-finding capacities, can better implement the principle than can the courts.¹⁰¹

Of course there are difficult issues of strategy, timing, and implementation. Some legal interventions may not be fruitful; they may even be counterproductive. Some may breed confusion and resentment. Others may be unintelligible. Still others may disrupt a society's basic organizing frameworks in a way that does great harm and little good. Outsiders — and insiders too — will often know too little, and both must be careful about introducing legal

99. The high-water mark of the anticast understanding was probably *Loving v. Virginia*, 388 U.S. 1 (1967), with its reference to "White Supremacy." 388 U.S. at 11. The triumph of the antidifferentiation idea can be found in *Washington v. Davis*, 426 U.S. 229 (1976), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

100. For present purposes I do not discuss the possibility that the Privileges or Immunities Clause would be a better source of the equality principle of the Fourteenth Amendment.

101. See ROSENBERG, *supra* note 48, at 336-43 (arguing that courts alone can do little in the way of social reform).

principles that do not cohere with cultural norms. Context will therefore matter a great deal. But these issues concern quite different matters from the issue of principle that I am now discussing.

3. *Suspect Classes*

What is the relationship between the anticaste principle and the familiar idea that some classifications are "suspect," in the sense that the courts will be hostile to discrimination against certain groups? We can start by observing that the Supreme Court has granted heightened scrutiny to laws that discriminate against certain identifiable groups thought likely to be at particular risk in the ordinary political process.¹⁰² When the Court grants heightened scrutiny, it is highly skeptical of legislation, and the burden of every doubt operates on behalf of groups challenging the relevant laws.¹⁰³

The difference between the two ideas can be described in the following way: The notion of suspect classifications is based on a fear that illegitimate considerations are likely to lie behind legislation, whereas the anticaste principle is designed to ensure against second-class status for certain social groups. The two ideas overlap, because lower castes may well be subject to legislation grounded on illegitimate considerations. But the two ideas are nonetheless distinct, because illegitimate considerations may lie behind legislation discriminating against groups that do not count as lower castes, and because the anticaste principle imposes duties on government that go well beyond a ban on illegitimately motivated legislation.

In deciding whether to grant heightened scrutiny, the Court has not been altogether clear about its underlying rationale. The Court appears to have examined a set of factors — above all, the relevance of the group characteristic to legitimate governmental ends, the likelihood that the group in question will be subject to prejudice, the immutability of the characteristic, the existence of past and

102. See *Croson*, 488 U.S. at 470-72 (applying strict scrutiny to legislation using racial distinctions); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985) (refusing to apply strict scrutiny to legislation distinguishing the mentally retarded because of the lack of a legal tradition disadvantaging this group); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (applying heightened scrutiny to legislation using gender distinctions).

103. I am putting to one side the distinction between "strict scrutiny," used in the racial context, and "intermediate scrutiny," used in the context of sex discrimination. An interesting development is the Court's recent suggestion that it has failed to determine whether gender classifications are inherently suspect and thus whether intermediate scrutiny or strict scrutiny should apply in gender cases, see *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 n.6 (1994) (deciding a gender discrimination case without mentioning the difference between intermediate and strict scrutiny), though it is not clear that there is much difference between the two standards.

present discrimination, and the group's lack of political power.¹⁰⁴ In this way, it has moved well beyond the defining case of discrimination against blacks to include discrimination against women, illegitimate children, and sometimes aliens.¹⁰⁵

Most of these factors have yet to be fully analyzed. They purport to involve a quasi-factual investigation into real data, but they actually depend on controversial and usually unidentified normative judgments. For example, we cannot know whether a characteristic is "relevant" just by looking at facts. Often race and sex are relevant to employment decisions, in the sense that profits depend on them. We cannot know whether a group has historically been subject to "discrimination" without knowing whether the unequal treatment was justified; discrimination is of course a value-laden category.

Similarly, a major problem with the key issue of political powerlessness is that relevant judgments are based not simply on facts about political influence. They also depend on some controversial and usually unarticulated claims about how much political power is *appropriate* for the group in question and about the legitimacy of the bases for legislative judgments on matters affecting the group. The claim that a group is politically weak in the constitutional test is thus a product of controversial and rarely articulated claims.

For example, blacks may have a good deal of political power; they can influence elections, even elections of the President. The same is true of women, who of course can affect elections a great deal. The potentially large electoral influence of both groups does not exclude them from the category of groups entitled to particular protection against discrimination. The reason is that even if they can wield political influence, prejudice in the constitutionally relevant sense is likely to operate against both blacks and women in the political process. Blacks may be subject to hatred or devaluation; women may be subject to stereotypes about their appropriate role that affect their political power and even their own aspirations. The conclusion is that the category of political powerlessness looks like an inquiry into political science, but it really depends on some judgments about the legitimacy of the usual grounds for government action classifying on the basis of race and sex. The real question is whether legislation disadvantaging the relevant group is peculiarly

104. See *J.E.B.*, 114 S. Ct. at 1424-26.

105. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1978) (women); *Graham v. Richardson*, 403 U.S. 365 (1971) (illegitimate children); *Trimble v. Gordon*, 430 U.S. 762 (1977) (aliens).

likely to rest on illegitimate grounds. Heightened scrutiny is a way of testing whether it does.

This discussion should show that the basic features of the Court's analysis — the history of discrimination, the category of prejudice, the inquiry into whether the relevant characteristic is immutable — can be analyzed in the same way. These ideas are designed to help determine if illegitimate considerations typically underlie legislation classified on the relevant basis. As noted, a judgment that there has been a history of discrimination depends on a theory of appropriate distribution, at least of a general sort. We rarely say that criminals have suffered a history of discrimination, and if we do say so, it is not because they are punished for criminal conduct. To say that there has been prejudice is to say that the usual grounds for discrimination are impermissible, even though those grounds may represent good-faith moral convictions. Consider, for example, the widely held view that women and men should occupy different social roles — a view that, despite its popularity, may not be used to support legislation. Moreover, immutability is neither a necessary nor a sufficient condition for suspect class status. Blind people are not entitled to the heightened scrutiny accorded legislation targeting suspect classes, even though the condition of being blind is usually immutable. And if new drugs or technology allowed blacks to become whites, or vice versa, and made sex-change operations feasible and cheap, would courts abandon their careful scrutiny of race and sex discrimination? Surely not.

My major point here is that the anticaste principle is quite different from the antidiscrimination principle. We might therefore think that under current doctrine, discrimination against, for example, Asian Americans and Jews should be presumed invalid, without also thinking that Asian Americans and Jews count as lower castes. The inquiry into suspect classification is therefore quite different from the inquiry into caste, though the two ideas do overlap.

4. Discrimination Without Caste? Caste Without Discrimination?

The above discussion illustrates that many groups that are frequently subject to discrimination do not qualify as lower castes in the way I have understood that term. It seems reasonable to think that Asian Americans suffer from discrimination and prejudice, but it is doubtful that they qualify as a lower caste, because they do not appear to be systematically below other groups in terms of the basic indicators of social well-being. The same is true for many other

groups subject to discrimination, including, for example, homosexuals and Jews. Homosexuals are not a lower caste in the sense that they are not worse off than heterosexuals in terms of many of the usual indicators of social welfare; they cannot show second-class citizenship in this sense. But they are also subject to pervasive discrimination and prejudice, with possibly corrosive effects on self-respect, and in that sense they are subject to social practices connected to the issues of caste that I have been discussing.

Nothing I have said here is meant to legitimate discrimination against groups that have suffered and continue to suffer from private and public prejudice. For example, there is indeed an equality norm that is offended by discrimination on the basis of religion. Though I cannot support the point here, I think the same is true for discrimination on the basis of sexual orientation. But the anticaste principle does not cover groups simply by virtue of the fact that they are often subject to illegitimate discrimination. The anticaste principle has special meanings and uses. It does not exhaust the several constitutional principles of equality.

C. *Some Data*

As I have understood the matter, the inquiry into caste has a large empirical dimension. The principle focuses on whether one group is systematically below others along important dimensions of social welfare. I offer some relevant information here. Needless to say, the account is far from complete. Throughout this discussion it will be useful to recall that about twelve percent of Americans are black.

It is not surprising to find dramatic disparities between whites and blacks along nearly all dimensions of social well-being. Begin with economic measures. The per capita income of whites is nearly double that of blacks. The median income of white households is \$37,783, as compared to \$21,548 for black households.¹⁰⁶ Nearly one-third of black Americans live below the poverty level, compared to about one-tenth of white Americans.¹⁰⁷ Ten percent of whites over sixty-five live below the poverty line, as compared to about a third of blacks.¹⁰⁸ Perhaps worst of all, 45% of black children live below the poverty line, as compared to 16% of white chil-

106. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, at 467 tbl. 732, 462 tbl. 721 (113th ed. 1993) [hereinafter *STATISTICAL ABSTRACT*].

107. *Id.* at 471 tbl. 740.

108. *Id.* at 470 tbl. 739.

dren.¹⁰⁹ About a quarter of black households earn less than \$10,000 per year, compared to fewer than 10% of white households.¹¹⁰

There are also striking disparities with respect to unemployment levels. In 1992, 6.5% of whites were unemployed, as compared to 14.1% of blacks.¹¹¹ Disparities of this sort persist over time. Consider the chart on the following pages:

109. *Id.* at 469 tbl. 736.

110. *Id.* at 464 tbl. 725.

111. *Id.* at 413 tbl. 652.

[Percent; monthly data seasonally adjusted]

Year or month	All civilian workers	White				Black and other or Black										
		Males		Females		Total	Males		Females							
		Total	16-19 years and over	20 years and over	Total		16-19 years	20 years and over	Total	16-19 years	20 years and over					
1972	5.6	5.1	4.5	14.2	3.6	5.9	14.2	4.9	10.0	8.9	29.7	31.7	7.0	11.4	38.4	8.8
1972									10.4	9.3	31.7	7.0	11.8	40.5	9.0	
1973	4.9	4.3	3.8	12.3	3.0	5.3	13.0	4.3	9.4	8.0	27.8	6.0	11.1	36.1	8.6	
1974	5.6	5.0	4.4	13.5	3.5	6.1	14.5	5.1	10.5	9.8	33.1	7.4	11.3	37.4	8.8	
1975	8.5	7.8	7.2	18.3	6.2	8.6	17.4	7.5	14.8	14.8	38.1	12.5	14.8	41.0	12.2	
1976	7.7	7.0	6.4	17.3	5.4	7.9	16.4	6.8	14.0	13.7	37.5	11.4	14.3	41.6	11.7	
1977	7.1	6.2	5.5	15.0	4.7	7.3	15.9	6.2	14.0	13.3	39.2	10.7	14.9	43.4	12.3	
1978	6.1	5.2	4.6	13.5	3.7	6.2	14.4	5.2	12.8	11.8	36.7	9.3	13.8	40.8	11.2	
1979	5.8	5.1	4.5	13.9	3.6	5.9	14.0	5.0	12.3	11.4	34.2	9.3	13.3	39.1	10.9	
1980	7.1	6.3	6.1	16.2	5.3	6.5	14.8	5.6	14.3	14.5	37.5	12.4	14.0	39.8	11.9	
1981	7.6	6.7	6.5	17.9	5.6	6.9	16.6	5.9	15.6	15.7	40.7	13.5	15.6	42.2	13.4	
1982	9.7	8.6	8.8	21.7	7.8	8.3	19.0	7.3	18.9	20.1	48.9	17.8	17.6	47.1	15.4	
1983	9.6	8.4	8.8	20.2	7.9	7.9	18.3	6.9	19.5	20.3	48.8	18.1	18.6	48.2	16.5	
1984	7.5	6.5	6.4	16.8	5.7	6.5	15.2	5.8	15.9	16.4	42.7	14.3	15.4	42.6	13.5	
1985	7.2	6.2	6.1	16.5	5.4	6.4	14.8	5.7	15.1	15.3	41.0	13.2	14.9	39.2	13.1	
1986	7.0	6.0	6.0	16.3	5.3	6.1	14.9	5.4	14.5	14.8	39.3	12.9	14.2	39.2	12.4	
1987	6.2	5.3	5.4	15.5	4.8	5.2	13.4	4.6	13.0	12.7	34.4	11.1	13.2	34.9	11.6	
1988	5.5	4.7	4.7	13.9	4.1	4.7	12.3	4.1	11.7	11.7	32.7	10.1	11.7	32.0	10.4	
1989	5.3	4.5	4.5	13.7	3.9	4.5	11.5	4.0	11.4	11.5	31.9	10.0	11.4	33.0	9.8	
1990	5.5	4.7	4.8	14.2	4.3	4.6	12.6	4.1	11.3	11.8	32.1	10.4	10.8	30.0	9.6	
1991	6.7	6.0	6.4	17.5	5.7	5.5	15.2	4.9	12.4	12.9	36.5	11.5	11.9	36.1	10.5	
1992	7.4	6.5	6.9	18.4	6.3	6.0	15.7	5.4	41.1	15.2	42.0	13.4	13.0	37.2	11.7	

We might turn to education, longevity, and crime. Over 80% of whites have completed high school, while about two-thirds of blacks have their high school diplomas.¹¹³ About 23% of whites have completed a college degree, as compared to about 13% of blacks.¹¹⁴ The life expectancy of a white American is four years longer than the life expectancy of a black American.¹¹⁵ From 1970 to 1990, about ten people per 100,000 were murdered each year.¹¹⁶ During this same period, the annual murder rate for white men ranged from seven to ten per 100,000, compared to a range of fifty to eighty for black men.¹¹⁷ Similarly, the murder rate for white women was between two and three per 100,000, compared to ten to fifteen for black women.¹¹⁸ In 1991, thirty whites out of a thousand were subject to a crime against their person, down from thirty-two in 1973, but forty-four blacks out of a thousand were subject to such a crime, up from forty-two in 1973.¹¹⁹

Consider political representation. Of the 435 members of the House of Representatives, only forty are black. In the Senate, the numbers are even more striking: of the one hundred senators, only one is black.¹²⁰ There are also inequalities in political participation. About 70% of white people were registered to vote, as compared to 64% of blacks, in the 1992 elections. There are slightly higher disparities for voting itself, showing about a 10% differential in the last presidential election.¹²¹

With respect to sex inequality, most of the numbers are far less dramatic. Women's life expectancy is higher than that of men.¹²² The educational attainment of men and women is about the same, especially in light of changes over the past twenty years — though white men are significantly more likely to be college graduates than white women.¹²³ Most of the disparities between men and women involve income, wealth, and political representation.

113. STATISTICAL ABSTRACT, *supra* note 106, at 153 tbl. 232.

114. *Id.*

115. *Id.* at 85 tbl. 115.

116. *Id.* at 94 tbl. 129.

117. *Id.*

118. *Id.*

119. *Id.* at 197 tbl. 309.

120. Telephone Conversation with the Office of the Congressional Black Caucus (Sept. 1, 1994).

121. STATISTICAL ABSTRACT, *supra* note 106, at 283 tbl. 454.

122. *Id.* at 85 tbl. 116.

123. *Id.* at 153 tbl. 231.

The basic economic indicators show large differences. About 69.3% of women are in the labor force, as compared to 88.9% of men. The median yearly earnings of women is \$24,000, compared to \$35,850 for men. At every stage of educational attainment, men out-earn women by a substantial margin. The average annual income of a woman high school graduate is about \$19,000; for a man, the average is about \$28,000. For a woman with some college education, the annual figure is over \$22,000, as compared to over \$33,000 for a man. For a woman who has at least a bachelor's degree, the annual figure is about \$33,000, as compared to over \$50,000 for a man.¹²⁴

The poverty rate for single-mother families is 59%.¹²⁵ Note in this regard that 15,396 children under eighteen live only with their mother, compared to the 2182 who live with their father only.¹²⁶ And after divorce, the average standard of living of men increases by 42%, whereas that of women decreases by 73%.¹²⁷ There are 388 male representatives in the House of Representatives and forty-eight women.¹²⁸ Of one hundred senators, only seven are women.¹²⁹

This is merely a brief collection of information showing group-based disparities that bear on the question of second-class citizenship. As we will soon see, the information suggests a need to shift from judicial to legislative forums — and also, ironically, to use race- and gender-neutral remedies.

III. THE FUTURE

A. *From Antidiscrimination to Anticaste*

Equality law has had two principal stages. The first was concerned with preventing explicit discrimination, public or private, against blacks and women. This included the attack on American apartheid, led by Thurgood Marshall and culminating in *Brown v. Board of Education*,¹³⁰ and also the attack on explicit sex discrimination, led by Ruth Bader Ginsburg.¹³¹ The legal assault on public

124. *Id.* at 394 tbl. 624, 467 tbl. 731.

125. *Id.* at 470 tbl. 737.

126. *Id.* at 63 tbl. 79.

127. OKIN, *supra* note 18, at 161. These are contested figures, though the claim of a general disparity is uncontroversial.

128. 1994 CONGRESSIONAL STAFF DIRECTORY at xix-xxvi (Ann L. Brownson ed., 1994).

129. *Id.* at xvii-xviii.

130. 347 U.S. 483 (1954).

131. *See, e.g.,* Califano v. Goldfarb, 430 U.S. 199 (1977).

discrimination was eventually matched by the statutory attack on private discrimination.¹³² The second stage consisted of challenges to public and private practices that did not involve explicit discrimination but that stemmed from prejudice or that otherwise had large and not adequately justified discriminatory effects.¹³³ This second stage built on the first. Neither has entirely run its course.

Both of these movements for reform had substantial success, certainly in eliminating the most conspicuously unsupportable public and private practices. Both were connected with anticaste goals, and to the extent that they operated within the judiciary, they were also well adapted to the limited institutional capacities of the judiciary.¹³⁴ On the other hand, the successes, important as they have been, have had ambiguous effects on the inequalities discussed above. From what has been said thus far, it should be clear that if the elimination of second-class citizenship is an important social goal, it would be valuable to start in new directions, some of which have not typically been associated with civil rights at all.

If opposition to caste is a basic goal, civil rights policy should concern itself first and foremost with such problems as lack of opportunities for education, training, and employment; inadequate housing, food, and health care; vulnerability to crime, both public and private; incentives to participate in crime; disproportionate subjection to environmental hazards; and teenage pregnancy and single-parent families. Policies of this kind suggest a major shift in direction from the more narrowly focused antidiscrimination policies of the past.

This is hardly the place for a full program for legislative reform. But in resolving current problems, most of the traditional claims of civil rights law provide incomplete help. The problem is not rooted in explicitly race- or sex-based classification, nor does it lie in prejudice, at least not in any simple sense.¹³⁵ It lies instead in policies and programs that contribute to second-class status, often in ex-

132. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended principally at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991)).

133. See, e.g., Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973b (1988)); Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended principally at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991)).

134. But see ROSENBERG, *supra* note 48, at 169, 226-27 (arguing that the Court has been unable to improve the lot of women or blacks and that any progress achieved by these two groups usually resulted from extrajudicial forces).

135. The problem may well lie in a form of selective racial empathy and indifference, but this notion is hard to administer, for reasons well discussed in Strauss, *supra* note 38, at 939, 988-90.

tremely complex ways involving interactions between past practices and a wide array of current policies.¹³⁶

In proposing reforms, we might look quite eclectically at a range of protections against the sorts of disparities discussed above. For example, policies promoting economic growth are an important part of equality law insofar as growth is associated with employment and the reduction of poverty. But because the association is imperfect,¹³⁷ many other steps are necessary. I simply note a few possibilities here; of course a range of details would be required in order to assess any of them.

Targeted educational policies, including efforts to promote literacy and Head Start programs, provide promising models.¹³⁸ At least partial successes have resulted from parental leave and "flex-time" policies.¹³⁹ Certainly, employment-related policies are important insofar as job increases are closely connected with the reduction of poverty. In the area of voting rights law, the race-neutral remedy of cumulative voting might be preferable to racially explicit approaches.¹⁴⁰ Consider as well recent initiatives designed to reduce violence generally and violence against women in particular — through education, additional government resources for crime prevention and punishment, and new legal remedies for victims of sex-related violence.¹⁴¹ We might compare these with President Clinton's recent executive order on environmental justice, designed to prevent disproportionate health and safety effects from the existence of environmental hazards.¹⁴²

136. A model discussion is CHRISTOPHER JENCKS, *THE HOMELESS* (1994) (tracing the causes of increased homelessness to a variety of indifferent or well-intentioned governmental and social actions, such as the destruction of skid row housing and the deinstitutionalization of the mentally ill).

137. See Sunstein, *supra* note 64, at 1307-08 (arguing that the productivity gains leading to economic growth can actually fail to help the poor).

138. See Laura A. Miller, *Head Start: A Moving Target*, 5 YALE L. & POLY. REV. 322 (1987) (portraying Head Start as one of the clear success stories of the Great Society).

139. See Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought in the 1970's*, 1989 U. CHI. LEGAL F. 9.

140. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 149 (1994); Richard H. Pildes, *Gimme Five*, NEW REPUBLIC, Mar. 1, 1993, at 16.

141. See, e.g., Violence Against Women Act, S. 11, 103d Cong., 1st Sess. (1993); H.R. 1133, 103d Cong., 1st Sess. (1993).

142. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

Of course there are limits to how much legal reform can do to redress these problems, at least in the short run. But there is much that law can do to help.¹⁴³

B. *Against Race Consciousness*

On the account I have offered, there is no constitutional objection to genuinely remedial race- and sex-conscious policies, at least as a general rule.¹⁴⁴ If a basic goal is opposition to caste, affirmative action policies are ordinarily permissible. Partly this lesson stems from the history of the Civil War Amendments; if history is relevant, it is hard to support the view that affirmative action programs are invalid.¹⁴⁵ But partly it is a lesson of logic. We have seen that in an important way the antidiscrimination principle is continuous with the affirmative action principle. Insofar as statistical discrimination is outlawed, the government has singled out one form of rational categorization and subjected it to special disability. At least along this dimension, the antidiscrimination principle partakes of an affirmative action principle.

To be sure, it may be possible to generalize from the Civil War Amendments a general opposition to the use of skin color as a basis for the distribution of social benefits and burdens. Perhaps we should say that government ought never or rarely to consider skin color in its official decisions, because use of skin color has bad educational and expressive effects, and because it legitimates the view that people should see each other, and themselves, in racial terms. But this view is historically adventurous,¹⁴⁶ and it would also involve a highly intrusive role for the courts. Race-conscious programs occupy an exceptionally wide range. They can be found in

143. See, e.g., CASS N. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 77-81 (1990); Donohue, *supra* note 94 (arguing that employment discrimination laws successfully reduced discrimination); Miller, *supra* note 138 (describing the successes of the Head Start program).

144. A qualification is necessary here. Many race- and sex-conscious programs may be only pretextually remedial, especially in the gender context, in which purportedly remedial measures may in fact be discriminatory. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down a social security law giving benefits to women but not to men because the provision actually reflected irrational gender stereotypes). Also, some approaches might be too crudely connected with remedial goals, see, e.g., *Metro Broadcasting, Inc. v. Federal Communications Commn.*, 497 U.S. 547 (1991) (upholding a race-conscious approach despite its crudeness), or perhaps with rigid quotas, see, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

145. See Schnapper, *supra* note 89, at 789-98 (arguing that history does not support opposition to affirmative action programs).

146. See *id.* at 797-98 (arguing that courts categorically condemning "benign racial distinctions" such as affirmative action programs ignore the 130-year-old intentions expressed by Congress in the Freedmen's Bureau Act).

education, employment, licensing, and elsewhere.¹⁴⁷ They have been accepted at local, state, and federal levels and by courts, administrators, presidents, and legislatures;¹⁴⁸ they have come from people whose views sharply diverge, including conservatives and liberals alike — both Democrats and Republicans have supported them.¹⁴⁹ In these circumstances, judges should be extremely reluctant to say that there is anything like a flat ban on race-conscious programs.

It might be concluded that race- and sex-conscious remedial policies are not merely unobjectionable but even mandatory under an anticaste principle. Perhaps such policies are necessary in order to counteract second-class status; certainly many people have so thought. But such policies have a mixed record, and in some places and ways, they have been a conspicuous failure. Some platitudes are worth repeating: In some places, race-conscious judgments have stigmatized their purported beneficiaries, by making people think that blacks are present only because of their skin color. In some places, such judgments have fueled hostility and increased feelings of second-class citizenship. Some people who would do extremely well in some good institutions — schools or jobs — are placed by affirmative action in programs or positions in which they perform far less well, with harmful consequences for their self-respect. Ironically, affirmative action programs can aggravate problems of caste by increasing the social perception that a highly visible feature like skin color is associated with undesirable characteristics.

In part the failures have stemmed from resistance to any remedies at all for the legacy of discrimination, and it would be wrong to discount the extent to which opposition to affirmative action can stem from opposition to any change in the status quo. But in part the failure has stemmed from a general conviction that skin color and gender should not matter to social outcomes. In view of both history and principle, that conviction should not be discounted or

147. See, e.g., *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) (busing to desegregate Georgia schools); *Metro Broadcasting, Inc. v. Federal Communications Commn.*, 497 U.S. 547 (1990) (minority preferences for broadcast licenses); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (layoffs allocated partly by race).

148. See, e.g., *City of Richmond v. J.A. Croson Co.* 488 U.S. 469 (1989) (local construction set-aside program); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (congressional set-aside program in construction grants); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (state-level university admission program).

149. See 448 U.S. at 461-62 & n.38 (citing 123 CONG. REC. 12,941-43, 13,242-57 (1977)) (discussing the overwhelming passage of the minority business enterprises program at issue in *Fullilove* by both the Senate and the House).

trivialized. It is relevant in this regard that many defenses of affirmative action programs are hard to offer in public. Often the nature of affirmative action programs is not discussed publicly because to do so would be humiliating to the supposed beneficiaries or intolerable to the public at large.

Perhaps this is partly a product of the unfortunate rhetoric of affirmative action.¹⁵⁰ But partly it is a result of a deep-seated resistance to "racialism" as producing frequent unfairness in individual cases and as inconsistent with widespread convictions about the relationship between individual achievement and social reward. Elaborate arguments might be and have been offered to try to undermine this resistance and these convictions.¹⁵¹ But it is at least revealing that sometimes these arguments seem too elaborate to carry much weight before the very people to whom they are aimed.

I do not mean to say that all or most affirmative action programs should be abolished. There is too much variety to allow for sensible global judgments. But we know enough to know that such programs have often failed and that race-neutral alternatives are often better.

These considerations suggest both a presumption in favor of race- and gender-neutral policies and the need to develop legal reforms that are not gender- or race-conscious — that do not give rise to widespread fears that government is playing favorites or is subject to the lobbying pressure of well-organized private groups. And it would be possible to administer an anticaste principle in race- and gender-neutral terms. We can think of many examples, including broad-based anticrime and antidrug measures; literacy and educational programs; policies designed to protect children from poor health and from poverty, including neonatal care and childhood immunizations;¹⁵² and programs designed to discourage teen pregnancy and single-parent families. Policies of this kind could easily be designed in race- and sex-neutral terms, and such policies would be directed against many of the important problems faced by both blacks and women.

150. See Margaret J. Radin, *Affirmative Action Rhetoric*, in REASSESSING CIVIL RIGHTS 130, 136-38 (Ellen Paul et al. eds., 1991); see also Thomas Hill, *The Message of Affirmative Action*, in REASSESSING CIVIL RIGHTS, *supra*, at 108.

151. See, e.g., Strauss, *supra* note 19 (arguing that antidiscrimination and affirmative action are indistinguishable in principle).

152. Note the enormous disparity between infant mortality rates for blacks and the corresponding rates for whites. See *Gaps in Infant Mortality Rate Still Widening Between Blacks, Whites*, CHI. TRIB., Apr. 30, 1994, at 19.

These are some of the directions in which equality law might move in the future. It is ironic but true that a third stage of civil rights policy, directed most self-consciously against race and gender caste, might also be self-consciously designed — for reasons of policy and principle — so as to avoid race- and gender-specificity.

CONCLUSION

In this essay I have criticized three approaches to the problem of race and sex equality in law. Free markets can accomplish considerable good in the area of equality as everywhere else, but they are only a mixed blessing for race and sex equality. Reliance on existing preferences has related problems, at least to the extent that those preferences are an artifact of an unjust status quo. The notion that the law forbids unreasonable distinctions is purely formal. As often interpreted, the idea has substance behind it, and perhaps it is well suited to the institutional limits of the judiciary. But the substance is not simple to defend. It sometimes requires identical treatment in cases in which distinctions make sense, and ignores inequality when inequality is present. Sometimes the cause of equality requires people who are differently situated to be treated differently, and this is a major gap in constitutional doctrine.

I have suggested that one of the prevailing constitutional norms ought to be an anticaste principle, one that forbids social and legal practices from turning highly visible but morally irrelevant differences into a basis for second-class citizenship. I have also sought to show realms in which a system with castelike features persists in modern American society; this is an area in which a good deal of information is indispensable. Partly for this reason, the anticaste principle is mostly for legislative rather than judicial enforcement. Courts lack the requisite fact-finding capacity and electoral legitimacy. But this does not mean that others, prominently including Congress, are relieved of an important and even constitutional duty, violated by widespread current practices, to eliminate the castelike features of American society.